IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-904

BRUNSWICK CORPORATION,

Petitioner,

—v.—

PUEBLO BOWL-O-MAT, INC., BOWL-O-MAT PARAMUS OPERATIONS and HOLIDAY BOWL-O-MAT, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS

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Errata to Brief for Respondents

Page (and Line)	*Correction*
19 (first full paragraph, third line from bottom)	the quoted words "salvation operation" should read "salvage measure"
22 (first full paragraph, bottom line)	"1866" should read "A. 1866"
30 (second full paragraph, fourth line)	"opinion on" should read "opinion of"
32 (fifth line of the quoted excerpt from the du Pont case)	*"at any time"* should read *"at or any time"*
35 (first line)	"the" should be inserted between "thus," and "post-operative"
36 (first full paragraph of text, second line)	"holding as" should read "holding on"
38 (first full paragraph, first line)	"to" should be inserted between "holding on" and "or the retention"
38 (first full paragraph, second line)	"constitute" should read "constitutes"

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BRIEF FOR RESPONDENTS

Questions Presented

Both sides petitioned for a writ of certiorari. Respondents' petition has not been ruled upon and apparently has been held in abeyance for further action by the Court. On February 23, 1976 this Court certified the following two questions presented by Brunswick:

> 1. Does the mere continued presence in certain local markets of retail establishments allegedly "acquired" by a "deep pocket" manufacturer in violation of Section 7 of the Clayton Act afford a basis for competing retailers to recover damages under Section 4 of the Clayton Act when there is no proof that the "acquisitions" resulted in any lessening of competition or monopoly in those markets?

2. Does not the "failing company" principle require dismissal of a treble-damage action based on alleged violations of Section 7 of the Clayton Act where the plaintiffs' entire damage theory is based on the premise that the "acquired" businesses would have failed and disappeared from the market had the defendant not kept them alive by making the challenged "acquisitions"?

The Proper Scope of the Questions

The major premise in Brunswick's first question—that "there is no proof that the 'acquisition' resulted in any lessening of competition or monopoly in those markets"—is expressly discredited by the district court and by the court of appeals.

The district court concluded that "there was ample evidence adduced at the trial to show how Brunswick's entry into the retail market lessened competition" (37a)* and that "corporate size and status as a manufacturer are crucial to the question of whether competition was lessened" (44a).

The court of appeals took the view that "that there was sufficient evidence here to go to the jury on the theory that Brunswick's entry into a local retail market both created the possibility of substantially lessening horizontal retail competition and tended toward the creation of a retail monopoly" (11a) and that there was sufficient evidence of "potential harm to horizontal competitors" to submit the issue to the jury (14a).

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* Page numbers with an "a" suffix reference the opinions of the courts below annexed to Brunswick's petition.

In its decision on the equity aspects of the case the district court held (55a):

> Brunswick is a manufacturer of bowling equipment and its acquisition of these bowling lanes, which were potential and actual purchasers of its equipment, provided it with the opportunity of acting . . . as a rich parent with a deep pocket. In Brunswick's case, however, the opportunity to tap the deep pocket did not prove merely to be a potentiality.

In its brief Brunswick side-steps these findings and the jury's finding that it violated Section 7 using this verbal glissade (pp. 16-17, n. 14):

> Whether or not petitioner had a "deep pocket" and whether or not by reason thereof its "acquisition" and operation of bowling centers had a potential to harm horizontal competitors are questions relevant only to the issue of whether or not Section 7 was violated, and not to the questions presented to this Court.
>
> The first question presented in this case assumes, *arguendo,* that a Section 7 violation might be found. . . .

Thus the first question which related to the right of competing retailers to collect damages, as construed by Brunswick, seeks to project an argument and a ruling by this Court on a hypothetical question which contains an absurdity unworthy of the Court's attention. In effect the Court is asked to make a declaratory judgment on a jejune question of no importance and unrelated to the facts of the case as to whether damages may be found on an assumption, for purpose of argument only, that a Section 7 violation "might" be found.

We do not believe that the Court meant to subsume as a major premise in certifying this question that there might

be no evidence whatever to support the findings of the jury or the trial court as affirmed by the court of appeals. Indeed, Brunswick does not ask for a reversal of the fact findings. It instead pretends that they do not exist and that this case like some incubus in a vacuum survives without a factual showing of a violation of law and, consequently, that we should import into the certified language of the question—*"mere continued presence"*—the gloss that what is meant is *mere continued lawful presence.* Indeed, Brunswick's strained interpretation of the two questions would have this Court merely substitute an inconsistent fact hypothesis for the facts proved by abundant evidence and found by the jury. This method would block the Court from deciding any of the questions below which the court of appeals characterized as being "of first impression nationally" (6a), "exploring largely virgin antitrust territory" (7a), and having "far-reaching ramifications" (19a).

In short, Brunswick's interpretation of the questions sweeps away all that has happened in ten years of litigation.

Counterstatement of the Case

Brunswick's extreme position supposes potential of effect on competition *"arguendo"* being present but not an actual lessening of competition or tendency to monopolize (Brunswick Brief, p. 17, n. 14). Brunswick has relied upon hypothetical facts consistent with its hypothesis rather than the facts already of record which were determined by the jury, trial court (in equity) and court of appeals. Consequently respondents are required to make this Counterstatement of the Case.

A. *The Parties and Prior Proceedings*

Since late 1964 petitioner Brunswick Corporation ("Brunswick") has acquired and then operated 222 domestic bowling centers, including 167 operated in 36 states in 1973 at the time of trial (Pl. Ex. 46; A. 322, 1683-99; Pl. Ex. 49; A. 342, 1734; Pl. Ex. 50; A. 353, 1735). Each was acquired from an independent proprietor which had fallen behind or defaulted in payments to Brunswick for automatic pinsetters, lanes and other bowling equipment (Pl. Ex. 27; A. 242, 1628-31 at 1628; A. 261-62; A. 701-02). Within the first few months of 1965 Brunswick became the operator of the largest chain of bowling centers in the industry's history (Pl. Ex. 44; A. 312, 1675).

In their complaint filed in the United States District Court for the District of New Jersey on June 14, 1966, respondents Pueblo Bowl-O-Mat, Inc., Holiday Bowl-O-Mat, Inc., and Bowl-O-Mat Paramus Operations charged Brunswick with acquiring and then operating bowling centers in Pueblo, Colorado, in Poughkeepsie, New York and in or near Paramus, New Jersey in violation of Section 7 of the Clayton Act (15 U.S.C. §18). In all 222 of its acquisitions, Brunswick acquired and then operated the bowling centers through its Bowling Centers Operations Division ("BCOD").

Four of the six BCOD centers pertinent here were acquired by Brunswick in 1965. They were Belmont Lanes, a losing 24-lane center in Pueblo (Pl. Ex. 46; A. 322, 1683-99 at 1686); Dutchess Lanes, a losing 26-lane center in Poughkeepsie (A. 1691); and Interstate Lanes and Fair Lawn Lanes, a 40-lane and a 32-lane center located near Paramus (A. 1683) which were acquired at a bankruptcy sale (A. 476-78). In 1969 Brunswick acquired Ten-Pin-on-

the-Mall, a losing 36-lane center located a quarter of a mile from respondents' center in Paramus (A. 213), and in 1970 Brunswick began operating Lodi Lanes, a losing 40-lane center located near Paramus under a three-year lease (A. 1697-98; Pl. Ex. 81; A. 1442, 1850-63).

The first trial resulted in a hung jury on May 5, 1970 after one of 12 jurors held out for Brunswick for two days (A. 1360). The second trial ended on May 11, 1973 when six jurors unanimously returned verdicts in favor of respondents totally $7,074,090 (after trebling) based upon their finding that Brunswick had violated Section 7 by its illegal acquisition and operation of bowling centers in their markets.*

On September 17, 1973, the trial judge (Hon. Lawrence A. Whipple) denied Brunswick's post-trial motions in all important respects although Pueblo Bowl-O-Mat, Inc. was ordered to consent to a remittitur of $499,050. Judgments later entered by the district court awarded respondents $6,575,040 for treble damages, $428,468 for attorneys' fees, $18,509.32 for costs, and the relief of divestiture in Pueblo, Colorado and Paramus, New Jersey.

In its opinion filed August 29, 1975, the Court of Appeals for the Third Circuit affirmed in respondents' favor (a) that the district court properly found sufficient evidence to go to the jury on whether Brunswick violated Section 7 by acquiring and then operating bowling centers in the Pueblo,

* Thus after 59 trial days and 4,917 pages of trial transcript in this litigation now over ten years old, 17 out of 18 jurors have found in respondents' favor. The jury held in favor of Brunswick on claims asserted under Section 2 of the Sherman Act by the three respondents, their parent company Treadway Companies, Inc. and several other Treadway subsidiaries.

Paramus and Poughkeepsie markets (11a, 14a) and; (b) that the district court properly held that Section 4 of the Clayton Act provides a private remedy for Section 7 violations (19a, 24a). The Court of Appeals, nonetheless, reversed and remanded the case for yet a third trial because it felt that the district court had improperly instructed the jury concerning (a) the "new" test of "engaged in the flow of interstate commerce", formulated two years later in *United States* v. *American Building Maintenance Industries*, 422 U.S. 271, 283, 95 S.Ct. 2150, 2156 (1975) (15a-16a, 24a); (b) the elements to consider in determining if Brunswick's acquisitions substantially lessened competition or tended to create a monopoly in the relevant markets (21a-23a); and (c) the proper measures of damages (24a-27a).

B. *Facts Found by the Jury and the Trial Court Sitting in Equity*

BCOD became operative January 1, 1965 (Pl. Ex. 64; A. 828, 1746-64 at 1746), and during the ensuing three or four months BCOD created what was by far the largest chain of bowling centers in the domestic industry's history (Pl. Ex. 44; A. 312, 1675). This unprecedented growth of a chain was made possible by the powerful leverage Brunswick exerted as the country's largest manufacturer of bowling equipment (Pl. Ex. 87; A. 1448, 1864-65) and as the country's fourth largest credit organization extending vast credit to purchasers of Brunswick's basic lane and pinsetter equipment (Pl. Ex. 1; A. 107, 1574; Pl. Ex. 1A; Tr. 232, A. 1575; A. 91-96; A. 634-35). Brunswick's assets in 1965 were more than one-half billion dollars, and its revenues exceeded $300 million (D. Ex. 30; A. 1014, 1887-1906 at 1899). Brunswick represents that it is "the number one name in bowling" (A. 674; A. 677; A. 681; Pl. Ex. 29;

A. 264, 1632-51 at 1634) and has enjoyed 113 years of leadership in the industry (A. 128-29; Pl. Ex. 3; A. 128, 1587-92 at 1592).

Other dimensions of Brunswick's powerful integrated position in the bowling industry also were fully documented at the trial. Brunswick's net worth and gross revenues in 1973 were about seven times larger than the combined totals for the 10 largest independent bowling chains (A. 313-15; Pl. Ex. 45; A. 312, 1676-82; Pl. Ex. 46; A. 324, 1683-99). The second largest bowling chain operated 32 centers (Pl. Ex. 44; A. 312, 1675) as compared with Brunswick's 1973 total of 167 (Pl. Ex. 32; A. 274, 1661; Pl. Ex. 46; A. 324, 1683-99; Pl. Ex. 50; A. 353, 1735). The rest of this fragmented market was occupied by many smaller chains and individual operators (Pl. Ex. 44; A. 312, 1675). In 1971 Brunswick had net assets of $430,000,000, Treadway had a net worth of $4,118,000, and the remaining nine leading independent bowling chains had an aggregate 1968 net worth of only $132,172,000 (A. 315; Pl. Ex. 44; A. 312, 1675). Brunswick had total revenues of over $300 million in 1968 (A. 637-38), while the ten largest public corporations in the independent bowling-center business had total revenues of $49,461,000, or approximately 12% of Brunswick's (Pl. Ex. 44; A. 312, 1675).

On November 15, 1974, the district court handed down its opinion and order disposing of respondents' motion for equitable relief (50a-60a) in which Judge Whipple stated that "... I have specifically made findings concerning the anti-competitive practices utilized by the defendant in causing the plaintiffs' injury ..." (56a-57a).* Those

* The equity proceeding is not a separate matter. The court made its findings on the same record used by the jury, and the third circuit ruled that a Brunswick appeal from the jury verdict before the equity proceeding was decided was premature and required the jury verdict and the injunction to come up together as two claims of the same case (A. 1564-65).

express findings had as their central theme Brunswick's abuse of its powerful integrated position in the bowling industry generally and in the bowling center business in particular. The district court quoted an excerpt from *Reynolds Metals Co.* v. *Federal Trade Commission*, 309 F. 2d 223, 229-30 (D. C. Cir. 1962) and expressly found these facts (55a):

> Brunswick is a manufacturer of bowling equipment and its acquisition of these bowling lanes, which were potential and actual purchasers of its equipment, provided it with the opportunity of acting, like Reynolds, as a rich parent with a deep pocket. In Brunswick's case, however, the opportunity to tap the deep pocket did not prove merely to be a potentiality.
>
> The history of the bowling industry and Brunswick's role in it is particularly illustrative on this point. Prior to Brunswick's entrance into the market of operating bowling centers, control of these businesses rested in the hands of single proprietors and a few small chains. One year after its entrance, however, Brunswick controlled 176 bowling centers in the United States and immediately became the industry's largest single operator controlling 5.5 times more centers than any of its competitors (Pl. Ex. 32; A. 274, 1661).

Not surprisingly, in 1965 Brunswick received a legal opinion from counsel on this appeal stating that because of its highly integrated position in the bowling industry generally, Brunswick's occupancy of 25% or more of a particular local bowling center market probably would create an illegal monopoly (A. 227; A. 1260-67). Respondents in-

troduced evidence showing that through BCOD Brunswick wrested local market positions of 20% in Pueblo, of 20% in Poughkeepsie and of 39% in Paramus (Pl. Ex. 3; A. 128, 1587-97, at 1590; Pl. Ex. 10; A. 190, 1604-22 at 1620-21; Pl. Ex. 14; A. 415, 1626).

Beginning in 1965 independent Brunswick customers everywhere were forced to become direct competitors of their supplier Brunswick. They frequently competed with BCOD centers which either operated at substantial losses or at most realized minimum profits. Respondents' proof at the trial showed that continued operation of Brunswick's centers at a loss was the economic reality which confronted them in Pueblo, Poughkeepsie and Paramus. Indeed, during most of the years in question the BCOD centers in those three markets would have incurred substantially higher losses had they been required to assume the formidable burdens of indebtedness for pinsetters and lanes imposed upon independent Brunswick customers such as respondents. Plaintiffs' Exhibits 47 and 48 depict these critical facts for 1965-1972 in terms of profit-and-loss and cash flow realized (a) under BCOD's accounting, and (b) under accounting used by independent Brunswick customers. Annexed as Appendix A is a summary of Exhibit 47's pertinent figures.

Under BCOD's accounting Brunswick centers paid neither interest nor outstanding balances on pinsetters and lanes, whereas their direct competitors—the independent Brunswick customers such as respondents—had to pay Brunswick $320 for interest and $1,670 for outstanding balances due each year on each pinsetter and lane (Pl. Ex. 1; A. 107, 1574; Pl. Ex. 1A; Tr. 232, A. 1575-76; Pl. Ex. 2; Tr. 2504, A. 1584-86). As Appendix A shows, even under

the favorable BCOD accounting, Belmont Lanes lost $90,874 during 1965-1970, Dutchess Lanes lost $88,874 during 1965-1969, Ten-Pin-on-the-Mall lost $12,731 during 1969-1970 and 1972, and Lodi Lanes lost $73,512 in 1970 and 1972. The Appendix A figures also show that independent Brunswick customers would have lost $141,310 had they operated Belmont Lanes during 1966-1970, $153,582 at Dutchess Lanes during 1966-1969, $109,658 at Ten-Pin during 1970-1972, and $146,147 at Lodi Lanes during 1971-1972.

The dimensions of the losses incurred by Brunswick of $90,874 at Pueblo for the six years 1965-1970 and $88,874 at Poughkeepsie for the five years 1965-69 serve as a wry comment on the testimony at the trial of John L. Hanigan (Brunswick's Chairman of the Board) that BCOD centers operating at a loss should not be maintained for more than two or three years (A. 709).

Brunswick's "deep pocket" shaped virtually every aspect of the operations of the BCOD centers in Pueblo, Poughkeepsie and Paramus. In Pueblo, BCOD's Belmont initiated a "pattern" of "giveaways" and "price-cuts" as well as the "Learn to Bowl" inducment (A. 154-55; A. 169-170; A. 222-23). In Poughkeepsie, BCOD's Dutchess began price-cutting (A. 431) and Brunswick continued operation of the center despite losses each year which totaled $88,874 over five years (A. 621-24; Pl. Ex. 47; A. 341, 1700-16, at 1708; Pl. Ex. 48; A. 341, 1717-33, at 1725). The income of the Poughkeepsie respondent rose sharply after Brunswick closed Dutchess in 1969 (A. 435-36; A. 561-567; A. 830-34) to the magnitude of $429,348 in 1972 (Pl. Ex. 11; A. 205, 1623; A. 208; A. 562-64). And in Paramus Brunswick also underwrote numerous inducements in its BCOD centers, including cut-rate prices and free trips to

Europe (A. 222-23; A. 569) which would be "too expensive" for the Paramus respondent to offer (A. 223; A. 569). BCOD's Fair Lawn initiated cut-rate programs (A. 413-14), and Brunswick reduced prices at Ten-Pin-on-the-Mall (A. 419-21) and Interstate Lanes (A. 602-03).

The competitive advantages created by Brunswick's "deep pocket" for the BCOD centers vis-a-vis the Brunswick independent customers which were their direct competitors went far beyond the advantages normally enjoyed when competitors have limited resources. Respondents demonstrated at the trial that once Brunswick foreclosed on and then acquired one of its customers, the BCOD center it then operated enjoyed concrete competitive advantages which could be evaluated at $2,000 per lane per year. These competitive advantages accruing each year to BCOD centers are computed as follows (Pl. Ex. 1; A. 107, 1574; Pl. Ex. 1A; Tr. 232, A. 1575-76; Pl. Ex. 1B; Tr. 2075, A. 1577-83; Pl. Ex. 2; Tr. 2054, A. 1584-86; A. 86-87; A. 93-97):

	Independent Brunswick Customer	Competing BCOD Center
Interest	$ 320	$—0—
Unpaid balance/pinsetters	960	—0—
Unpaid balance/lanes	720	—0—
	$2,000	$—0—

For an average-sized Brunswick customer operating 40 lanes, those competitive advantages totaled $80,000 a year (Pl. Ex. 48; A. 341, 1717-33) and—at the old rate of fifty cents a game (A. 73)—such a Brunswick customer would have to set aside revenues realized from 160,000 games

each year in order to allow for these depreciation, interest and principal charges which Brunswick did not charge to itself. As applied to respondents, this competitive advantage for Brunswick amounted to $80,000 or 160,000 games yearly for respondents' 40-lane center in Pueblo (A. 124) and $72,000 or 140,000 games yearly for their 36-lane centers near Poughkeepsie (A. 187-88) and in Paramus (A. 211).

In its opinion on equitable relief dated November 15, 1974, the district court expressly found that the three respondents were victims of Brunswick's abuse of its deep pocket position in the bowling center industry (55a-56a):

> . . . As a credit-extending parent [Brunswick] was able to subsidize the purchase of its newly-acquired business at the rate of $2,000.00 per lane (Pl. Exs. 1, 1A, 2), while it placed the plaintiffs on a "cash only" basis although prior to entry in this market it customarily extended credit to these plaintiffs (Pl. Exs. 35-38; Lieblich [A. 282-98]). Obviously the defendant utilized its position as a major supplier and creditor not only to nourish its own newly-acquired children but also to deprive its newly-found rivals.
>
> This naturally jealous parent also sought to favor its newly-acquired businesses by endowing them with the allurements of give-away programs and special services as the Learn-to-Bowl series. The object was to attract and increase patronage of these bowling centers by individual bowlers and leagues. In this they were successful and drew patronage away from the plaintiffs. . . . The deep pocket of the rich parent certainly contributed to the expenditures made on these programs.

The district court later concluded that these abuses created the need for the award of divestiture (59a):

> . . . [I]t is apparent that the defendant's position in the bowling industry both as a supplier-purchaser and creditor-borrower has infused it with the capacity to out-distance the efforts of its rivals because of the deep pocket of its manufacturing arm. Whether this deep pocket should or should not be utilized to finance give-aways and other promotional schemes or to subsidize or not to subsidize the purchase of newer and more attractive bowling equipment, it is clear that the opportunity for abuse of this economic power is ever present.

BCOD officially came into being January 1, 1965 (Pl. Ex. 64; A. 838, 1746-64 at 1746), but long before then Brunswick had formulated the purposes it hoped to achieve by competing with its own customers through BCOD (Pl. Ex. 64; A. 828, 1746-64; A. 645-52; A. 693-701; A. 829-30; A. 1418-21). These included this key objective aimed at Brunswick's customers (Pl. Ex. 64; A. 828, 1745-64, at 1762):

> The A-2 conversions [more modern automatic pinsetters] in the better [BCOD] houses and certain geographical areas will aid in increasing revenues, enticing competition to try to convert also and thus assist the Bowling Division sales.*

Respondents became targets of Brunswick's objective concerning the A-2 conversions in Pueblo and Paramus. Although Belmont was a consistent loser rather than a "better" BCOD house (Pl. Ex. 64; A. 828, 1745-64 at 1762), Brunswick nevertheless installed the A-2 conversions there (A. 170) which shortened an average bowling game by 15 to

* Another articulated objective rebuts the claim that the acquisitions were part of a salvage operation. It was that consideration be given to using new BCOD centers as competitive barriers ("interceptors") against centers supplied by AMF, Brunswick's competitor in the sale of equipment (Pl. Ex. 64; A. 828, 1745-64 at 1754).

17 minutes, thus allowing the "second shift" of bowlers to begin earlier—a significant fact in "early-to-bed" Pueblo (A. 503-04). League bowling—a major component of a bowling center's revenue (Tr. 1198-99; A. 669-71)—was immediately siphoned off by Belmont (A. 503-04). The Pueblo respondent was not thereby enticed "to try to convert also" (Pl. Ex. 64; A. 828, 1745-64 at 1762) because the A-2's per-lane cost was substantially above $8,700 to $9,000 and the conversion from A-1 equipment cost $1,800 to $2,000 per lane (A. 505). Thus the A-2 conversions would have cost between $75,000 and $80,000. These figures were beyond the meager resources of the Pueblo respondent (A. 505-06), which lost over $62,000 in 1967 (A. 506) and which has always been in the red (A. 506-07; Pl. Ex. 8, A. 167, 1602).

Similar competitive distortions were experienced in Paramus when Brunswick installed A-2's in Interstate and Fair Lawn Lanes (A. 426-27; A. 829-30). But as in Pueblo, Brunswick failed to entice the Paramus respondent "to try to convert also" (Pl. Ex. 64; A. 828, 1746-64, at 1762) because it also consistently lost money due to Brunswick's anticompetitive pressures (Pl. Ex. 13; A. 220, 1625).

Still other aspects of the "deep pocket" created by Brunswick's integrated position in the bowling industry now are facts of record. Brunswick's exaggerated market surveys for potential customers induced far too many bowling centers to enter particular local markets for any one of them to have reasonable prospect for survival (A. 123-25; A. 189-98; A. 551-52). Strong economic pressure led Brunswick to make misleading surveys because once Brunswick persuaded a customer to open a center and to put a 30% down payment on its pinsetters (A. 674-75; A. 259-60), Brunswick instantly recouped its manufacturing cost on its

pinsetters; that cost was $2,100, or 26% of the $8,100 sales price charged to its customers (A. 649). Similar safety margins applied to sales of Brunswick's lanes. It is in this real world of Brunswick's certain profits that its statement that "[t]he bowling industry went into sharp decline and petitioner ran into a nightmare of collection problems and hopeless defaults" must be appraised (Brunswick Brief, p. 7).

Brunswick's economic stakes in each new sale of lanes and pinsetters were extremely high. Allowing for interest factors, purchases made by a typical 40-lane bowling center entailed payments of almost $400,000 for the pinsetters, over $200,000 for the lanes, and some $96,000 (excluding interest) for ancillary equipment (Pl. Ex. 1; A. 107, 1574), and the investment totalled $700,000 for this equipment alone. Unfortunately, however, the overbuilding caused the bowling center business to fall into a sharp decline, and hundreds of centers which became deeply in debt to Brunswick for pinsetters and lanes were vulnerable for the BCOD acquisitions which followed (A. 70-72; A. 261-62).

For example, seemingly in anticipation of its 1965 acquisition of Belmont in Pueblo (A. 169-70) Brunswick permitted Belmont to pay, after a down payment, only $2,300 for its lanes and pinsetters during 1962-65 whereas its direct competitor respondent Pueblo Bowl-O-Mat, Inc. was forced to pay full amounts due on its contract totaling some $240,000 during this three-year period (Pl. Ex. 1; A. 107, 1574; Pl. Ex. 7; A. 163, 1601; A. 144-46; A. 161-65). Thus for all practical purposes the Pueblo respondent was required to subsidize Belmont by some $237,700. Similar arithmetic was applicable to Brunswick's centers in the Poughkeepsie and Paramus markets.

Respondents experienced severe economic dislocations and competitive injuries in their local markets because of Brunswick's wilfull inducement of the overbuilding of bowl-centers. In Pueblo, AMF concluded on May 31, 1961 that new bowling facilities were not "justifiable" (A. 159-61; Pl. Ex. 6; A. 159, 1599-1600 at 1599). Brunswick nonetheless assured the Pueblo respondent prior to its August 1960 opening that it could expect 17,000 lines per lane per year (A. 123-25)—"an excellent volume of business" (A. 124)—and in 1962 Brunswick assured the potential owners of Belmont, which it later acquired, that there was a "definite need for more bowling facilities in this area" (Pl. Ex. 4, A. 128, 1593-97 at 1595) even though its contemporaneous analysis stated flatly that "the economy in Pueblo cannot support an additional 24 lanes . . . " (Pl. Ex. 6; A. 159, 1599-1600).

Brunswick's market surveys on both Pueblo and Poughkeepsie reflected both its insatiable drive to increase its bowling equipment sales and its reckless disregard of the accepted industry view that 1,500 to 1 was a healthy ratio of persons per lane. In Pueblo, AMF subtracted "25,000 people of extremely poor financial means" (Pl. Ex. 6; A. 159, 1599-1600 at 1599) in concluding that there actually was a ratio of 691 persons per lane, but less than a year later Brunswick advised Belmont that the ratio was 2,400 to 1 (Pl. Ex. 3; A. 128, 1587-9; Pl. Ex. 4; A. 128, 1593-97). And Brunswick's Evaluation Report No. 76 (Pl. Ex. 10; A. 190, 1604-22; A. 189-98) acknowledged that Brunswick itself caused overbuilding in the Poughkeepsie market, stating that although 950 to 1 is the "proper ratio", the actual ratio was 780 to 1 (Pl. Ex. 10; A. 190, 1604-22 at 1610, A. 189-98).

Brunswick claims that respondents' lawsuit "is in sharp contrast with the action of the Federal Trade Commission" (Brunswick Brief, p. 13, n. 9). Brunswick repeatedly has made this claim even though it knows it to be false because the F.T.C. stated categorically in 1969 that its earlier "no action" letters which supposedly support this claim could not "be in any sense interpreted as a determination of the issues involved in a privately litigated matter" (Supp. App. 49b to the briefs before the court of appeals).

C. *Facts Rejected by the Jury and Trial Court But Nonetheless Relied Upon by Brunswick*

The absurdity of the argument that this Court must decide this appeal on the basis of hypothetical facts which make irrelevant "whether or not Section 7 was violated" (Brunswick Brief, p. 17, n. 14)—rather than the facts of record which were before the jury and the trial court sitting in equity—is demonstrated from "factual" presentations made in Brunswick's Brief. First, the Brunswick Brief ignored the previously-described precise findings of the court and jury that Brunswick's "deep pocket" created tendencies to lessen competition or create monopolies in Pueblo, Paramus and Poughkeepsie.

Moreover, in its carefully insulated recital of the "Background" (Brunswick Brief, pp. 5-9) Brunswick portrays itself as an innocent victim of uncontrollable economic forces, striving solely to protect its accounts receivable and doing no more than repossessing lanes and pinsetters in the best interests of its stockholders. This thesis also is repeated in its versions of the BCOD acquisitions in respondents' three local markets (Brunswick Brief, pp. 9-13). These imagined "facts" about its heroic attempts to "salvage" its "distressed" BCOD centers were expressly rejected not only by

the jury but also by all of the members of the national trade association of independent bowling proprietors.

As noted (page 14), two major objectives which Brunswick hoped to achieve by entering the bowling center business were (1) to "assist the Bowling Division sales" by "enticing" Brunswick's customers to make expensive A-2 conversions in order to compete with converted BCOD centers, and (2) to use new BCOD centers as "interceptors" to AMF centers (Pl. Ex. 64; A. 828, 1745-64). Brunswick voiced quite different objectives when it attempted to justify BCOD before the aroused independent bowling center proprietors. The confrontation took place at the annual convention of the Bowling Proprietors Association of America ("BPAA") held in June 1965 in San Juan, Puerto Rico. In speeches made there by John L. Hanigan (then Brunswick's president) (Pl. Ex. 27; A. 242, 1628-31) and by BCOD head Milton Rudo (Pl. Ex. 74; Tr. 3419, A. 1802-34), BCOD repeatedly was depicted as a "salvation operation" or "distress" measure (Pl. Ex. 74; Tr. 3419, A. 1802-34 at 1806).

Mr. Rudo's speech was followed by unanswerable and prophetic questions from the floor.* Then the BPAA membership unanimously adopted this resolution which showed that they regarded "salvage" as sop for Cerebus (A. 244-45):

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* Typical challenges to Mr. Rudo: "Is it the fact . . . you have a little more money behind you to carry you through and maybe outlast the fellow down the street? This . . . is the crux of the whole thing" (Pl. Ex. 74; Tr. 3419, A. 1802-34 at 1821). "You have millions of dollars behind Brunswick" (Pl. Ex. 74; Tr. 3419, A. 1802-34 at 1822). "In other words, you would be in position to set the price [of centers] high enough so you couldn't sell them" (Pl. Ex. 74; Tr. 3419, A. 1802-34 at 1824). "[T]he concern of all of us [is] that the success of the Brunswick recovered houses is going to be at the expense of their neighbors in the bowling business" (Pl. Ex. 74; Tr. 3419, A. 1802-34 at 1830).

> Resolved, that we, the members of the Bowling Proprietors Association of America, hereby express our grave concern that the incursion of the Brunswick Corporation into the area of operation of bowling centers in direct competition with members or nonmembers of this Association is not in the public interest and is injurious to competition based upon its preeminent position as a manufacturer and supplier, major creditor and financier in the bowling field.

Although the district court excluded the exact wording of this resolution from the jury in order to avoid prejudicing Brunswick (A. 245), the jury was made aware of its substance. It also heard testimony from Rex M. Golobic, the current President of BPAA (A. 653-54), that this censure of Brunswick is still BPAA policy (A. 664-65).

Within four years Brunswick had abandoned all pretences about "salvage" and "distress". In June 1969 Mr. Hanigan told the New York Society of Security Analysts (Pl. Ex. 30; A. 268, 1652-60; A. 268) that Brunswick "found the bowling business at retail [is] a good business" (Pl. Ex. 30; A. 268, 1652-60 at 1657; A. 269) and in 1970 he predicted to Brunswick's stockholders that by 1973 BCOD would earn at least $3,000,000 annually before taxes. (In fact, BCOD's domestic profit for 1972 was over $6,000,000 per Pl. Ex. 32; A. 274, 1661.) Also in negation of its "salvage" claim, Brunswick built new centers (A. 265-67; A. 277-78; A. 1107-13; Tr. 2953-54; A. 1113-15; A. 1222-23) contrary to Mr. Rudo's claim in June 1965 that "we don't intend to develop new bowling centers" (Pl. Ex. 74; Tr. 3419, A. 1802-34, at 1817). Another fiction created by Rudo in June 1965—that any BCOD center "in our portfolio is for sale" (Pl. Ex. 74; A. 3419, 1802-34, at 1820)—was refuted by Mr. Hanigan's 1972 statement to Brunswick's

stockholders that only two of its 200-odd "salvaged" centers had been sold from 1965 through 1970* (A. 1382).

The fictitious nature of Brunswick's "salvage" thesis also is demonstrated by the vastly different policies of AMF, Brunswick's major competitor as a bowling manufacturer (A. 864). The court of appeals noted (9a, n. 5):

> By contrast with Brunswick, although AMF undoubtedly suffered from the decline in the bowling recreation industry in the early 1960s it never integrated forward into the retail end of the business so as to be in competition with its actual or potential customers.

Brunswick also is relying upon hypothetical facts instead of facts of record when it argues that "calling . . . repossessions 'acquisitions' does not make them the kind of transactions" which concerned Congress when it enacted Section 7 in 1914 and amended it in 1950 (Brunswick Brief, p. 14, n.10). This statement misconstrues the transaction. When Brunswick acquired a bowling center it did it by two steps, first foreclosing under its conditional bill of sale against the pinsetters and lanes, reflecting by far the largest investment in a bowling center (p. 16, *supra*). The foreclosure placed the proprietor of the center in an untenable position, making possible Brunswick's second step—the acquisition of the center itself. Repossession of the pinsetters and lanes left no options for the proprietor and left him helpless to resist the subsequent acquisition of the other assets of the center needed to run a going business, including real estate deeds or leases, league and nonleague customers, bars, liquor licenses and good will, a location near a bowling population (e.g., employees of large companies who may form industrial or commercial bowling

* One of these was to a California proprietor whose center was destroyed by an earthquake (A. 1207-10).

leagues), snack bars, lounges, nurseries, pro shops, rest rooms and vending machines (A. 66-68; A. 74-75).

Facts of record show that each dispossessed owner of the acquired BCOD center had to go out of business because Brunswick repossessed the basic lanes and pinsetters. Once Brunswick exercised that option the bowling utility of the center disappeared so the date of each Brunswick take-over constitutes a clear starting point for the running of damages. Consequently, the repossession of pinsetters and lanes (Brunswick repossessed some 23,000) forced the dispossessed proprietors out of the business of operating bowling centers. The Section 7 violation began at the precise moment of acquisition of the center itself, and at that moment no one other than Brunswick could replace the dispossessed operator. It should be noted that the choice to continue was Brunswick's. It could have without Clayton Act penalty repossessed the lanes and pinsetters, warehoused them and resold them at it did in most instances (D. Ex. 1; 1866).

It also should be emphasized that in the course of two lengthy trials Brunswick never offered any effective cross-examination of respondents' damages experts nor offered any testimony of its own as to a different measure of damages. The trial court described the dilemma posed by Brunswick's highly unorthodox trial tactics as follows (45a-46a):

> . . . [I]t is not error for the instructing Court to review the dollar amounts of the damages proposed by both plaintiff and defendant. . . . Reviewing the dollar amounts proposed by both sides was, of course, an impossible task in this case since defendant produced no damage evidence whatsoever. . . . It was admittedly difficult to maintain proper balance in the damages portion of the charge, but the source of the difficulty is obvious. Counsel choose the manner in which a case is to be tried, the court instructs on the law as it interprets it and the evidence adduced at the trial.

Summary of Respondents' Argument

1. The first question certified by the Court, as interpreted by Brunswick, suggests the erroneous major premise that Brunswick, the largest manufacturer of bowling equipment, acquired bowling center customers without any anticompetitive effects despite the strong contrary findings made by the trial judge in the equity aspect of the case, and the finding of violations made by the jury. The jury findings were made under instructions which necessarily presented the factual underlay of a conscious attempt by Brunswick to use its resources and its credit fulcrum to build a chain of bowling centers for itself by the device of first foreclosing on the important assets of the center—the automatic pinsetters and the removable lanes—and then later acquiring the various properties such as goodwill, licenses, leases, vending machines, bowling supplies and bars, which are the essentials of a modern bowling center. Following a two-step process Brunswick chose first to foreclose upon the debts owed to it by independent bowling proprietors. This foreclosure left no possibility of continued operation of the center by any independent proprietor and led to Brunswick's second step, the illegal acquisition of the center itself.

The question as interpreted by Brunswick also ignores Brunswick's continued operation of bowling centers at a loss in the competitive markets complained about. The losing operation of itself supports the finding of a violation of Section 7 and creates the necessary causal nexus for damages. Continued operation under these circumstances could not be legal even if we could conceive of a curious legal status in which the initial acquisition is unlawful but the continued existence of the center is lawful. This Court has frequently held to the contrary, at least inferentially, by

stating that divestiture is the normally expectable relief when an illegal acquisition takes place. Respondents contend that the facts found by the jury and court must necessarily be imported into the answer to the first question since otherwise the question becomes an abstraction which is not the product of and does not state the issues in this long-fought litigation.

Even were we to premise that the Court in certifying this question wanted to resolve a state of facts in which it believed that there was "no proof that the 'acquisition' resulted in any lessening of competition or monopoly", the answer to the question is "yes", since to hold otherwise would be to suggest that the mere retention of the centers itself constitutes a purge of the illegality which adhered to the acquisition. The question so read would suppose that the probability of anticompetitive effect sufficient to contaminate the acquisition never was realized and, consequently, the retention of acquisition affords no basis for damage claims. This view would encourage unlawful acquisitions and, contrary to the general principles of tort law, would leave the wrongdoer with the fruits of his wrong. In the very case at bar the third circuit thought that divestiture was inappropriate because of the ten-year lapse of time between the acquisitions and its decision. Thus, if the respondents were unable to recover damages and unable to cause divestiture of the "presence" with the potentiality of evil consequences, then Section 4 of the Clayton Act which gives relief to private persons would be rendered meaningless.

The injury caused to the respondents came from the following circumstances, all directly attributable to the status of Brunswick and its acts:

When a proprietor was in debt for expensive equipment Brunswick with its deep pocket, including its relationship as creditor to more than half of the bowling proprietors in the industry, could at its option

(a) forbear from foreclosing, as the record shows it did in some instances; or

(b) repossess the pinsetters and lanes, reselling them primarily in Japan and Europe (the record shows it did this in most instances); or,

(c) foreclose on the debt and instead of taking out the machines and lanes arrange for the acquisition of the bowling center properties generally and continue to operate them as an integrated supplier and bowling center proprietor (as the third circuit noted (9a n.5) Brunswick's chief manufacturing competitor AMF "never integrated forward into the retail end of the business so as to be in competition with its actual or potential customers").

When option (c) was used its direct consequence was that a debt-ridden proprietor was compelled to stop business through the foreclosure on the machines and lanes; at that moment in the normal sequence of events the surviving proprietors in the competitive market would have had their revenues increased by the bowling patronage of the center which had disappeared from the market. Respondents were damaged by loss of their fair shares of such revenues. When Brunswick chose to take the second step of bringing itself into the market it brought into the market an illegal presence which directly deprived the surviving proprietors of the increase of revenues which survivors would have enjoyed if Brunswick had not decided to operate a center at a

loss in the hope of future gain. In sum, the answer to question 1 is "yes", if the language of the question is to be considered as having any relationship to the context of the record built in this case.

2. The answer to question 2 is "no". As the trial court recognized, this underlying "Catch-22" proposition erroneously assumes that Brunswick may shift the burden of establishing that defense to respondents even though Brunswick's take-over of the bowling centers necessarily destroyed respondents' capabilities for showing what would have occurred to them "but for" Brunswick's repossession of its bowling equipment and acquisition of all the many other necessary adjuncts of a bowling center. Brunswick's failing business arguments must fall in face of a trial record that showed Brunswick itself destroyed all other viable business alternatives for the dispossessed center at the very moment it decided to dispossess.

Not only does Brunswick fail to meet the various prerequisites to assertion of the failing business defense as set forth in *Citizen Publishing Co.* v. *United States,* 394 U.S. 131, 89 S.Ct. 927 (1969) but also it cannot do so because it was Brunswick itself that caused the proprietors to "fail". It is fundamental law that one should not benefit from his own wrongdoing.

Finally, a recent sixth circuit decision, the gravamen of which we urge this Court to apply, holds that the failing business doctrine is not applicable to vertical as distinct from horizontal acquisitions. *United States Steel Corp.* v. *Federal Trade Commission,* 426 F.2d 592 (6th Cir. 1970). We argue not only that the doctrine has not in practice been applied to vertical acquisitions, but also that it should not be as a matter of sound public policy.

ARGUMENT

POINT I

Facts already of record establish that both the acquisition and later operation of Brunswick's bowling centers tended to lessen competition or to create a monopoly in violation of Section 7.

Turning to the facts of record rather than the hypothetical facts recited by Brunswick, question 1 must be answered in the affirmative. The anti-competitive forces found by the jury which made each Brunswick acquisition illegal under Section 7 in the first instance continued to be operative at all times after the acquisition. As we have shown in our Counterstatement of the Case, those anti-competitive forces resulted from Brunswick's "deep pocket" based upon its powerful integrated position in the bowling industry.

For example, Brunswick's continued operation at a loss of bowling centers over extended periods of time in and of itself represents an almost classic example of a Section 7 violation. In *Reynolds Metals Co.* v. *Federal Trade Commission,* 309 F.2d 223 (D.C. Cir. 1962), the acquisition by "the largest producer of aluminum foil in the world" of one of eight small converters of foil selling nationally to florist supply houses was held unlawful, principally because it allowed the "deep pocket" defendant to enter the retail market previously occupied by "relatively small" companies, and because the acquisition "opened the possibility and power to sell at prices approximating cost or below and thus undercut and ravage the less affluent competi-

tion" (309 F.2d at 229-30). Section 7 violations also were found on very similar facts in *United States Steel Corp.* v. *Federal Trade Commission,* 426 F.2d 592, 603-04 (6th Cir., 1970):

> . . . [T]he sheer size and financial resources of U. S. Steel visit non-competitive stabilizing forces upon the competitors of Certified and U.A.C. . . . No other cement or ready-mix company is in any position to compete with U. S. Steel's ability to extend credit, to exploit allied personal and financial ties in the building industry, to maintain and capture the accounts of others in the event of slackened demand, or to withstand temporary losses.

Section 7 was also violated in *Federal Trade Commission* v. *Procter & Gamble Co.,* 386 U.S. 568, 87 S.Ct. 1224 (1967), when "the largest manufacturer of household bleach" was acquired by "a large diversified manufacturer of soaps, detergents and cleansers" (386 U.S. at 570, 572, 87 S.Ct. at 1226-27). The FTC found that the acquisition created "the danger that Procter might underprice Clorox in order to drive out competition and subsidize the underpricing with revenues from other products" (386 U.S. at 575, 87 S.Ct. at 1228).

The operation of losing retail centers over extended periods of time was found to violate Sections 1 and 2 of the Sherman Act in *United States* v. *New York Great A. & P. Tea Co.,* 173 F.2d 79, 87 (7th Cir. 1949):

> . . . The record is replete with instances of deliberate reductions of gross profit rates in selected areas. Thus Area Y, at the desire of the policy makers of A&P, can be brought to aid in the struggle in Area X, which in numerous instances, as the record shows, sustained

> heavy net losses for periods extending over a substantial number of consecutive years. . . .
>
> On this record it seems apparent that the goal of the conspiracy to establish a two-price level at the buying level, which enables A&P to meet its competitors with an enormous advantage at the retail level, has been realized.

The same result was reached in *United States* v. *Grinnell Corporation,* 236 F. Supp. 244, 254 (D. R.I. 1964), *aff'd,* 384 U.S. 563, 86 S.Ct. 1698 (1966):

> . . . [B]ecause of their national operations, one or more of defendant alarm companies choose in some areas to operate at a loss. ADT's own counsel, in both brief and oral argument stressed, paradoxically, that it operated 20 *"deficit"* offices in cities with no other central station. Counsel seems not to appreciate that this fact is a strong point against defendants. It conclusively proves that defendants enjoy national monopolistic power which permits one of the conspirators to occupy local markets where no independent CSPS station would long function and to extend to each of them the combination's national monopolistic control. *Hardly any indicium of monopoly power is more persuasive than the continued capacity of the asserted monopolistic combination to sustain offerings at a loss either in particular areas or in particular services or products.* [Emphasis in original.]

The Section 7 violation here has as one of its characteristics the fact that Brunswick could subsidize these losing bowling centers only because of the deep pocket created by its highly integrated and profitable position in the bowling industry. Comparable integrated positions in particular industries have formed the bases for findings of Section 7 violations in numerous cases. See, for example,

Brown Shoe Co. v. *United States,* 370 U.S. 294, 82 S.Ct. 1502 (1962); *United States* v. *Kimberly-Clark,* 264 F. Supp. 439 (N.D. Cal. 1967); *United States* v. *Atlantic Richfield Company,* 297 F. Supp. 1061 (S.D. N.Y. 1969), *aff'd sub nom. Bartlett* v. *United States,* 401 U.S. 986, 91 S.Ct. 1233 (1971); *General Foods Corp.* v. *Federal Trade Commission,* 386 F.2d 936 (3d Cir. 1967).

In *Sanitary Milk Producers* v. *Bergjans Farm Dairy, Inc.,* 368 F.2d 679 (8th Cir. 1966), the court said (368 F.2d at 691):

> Sanitary's dominant [50%] position in the raw milk production was necessarily an element of influence in anything it might choose to do and demanded caution on its part when it embarked on processing.

Brunswick argues that there "was no lessening of competition and no monopoly" but instead "a mere substitution of competitors" (Brunswick Brief, p. 30). The district court disposed of these arguments in its opinion on September 17, 1973 (37a, 44a):

> The question of whether the plaintiffs proved their damages as a proximate result of the defendant's activities is one for the fact-finder. . . . There was ample evidence adduced at the trial to show how Brunswick's entry into the retail market lessened competition . . . .
>
> • • • • •
>
> Defendant argues that its corporate size and the fact that it is a manufacturer of bowling supplies are completely irrelevant to the case. This Court disagrees. Corporate size and status as a manufacturer are crucial to the question of whether competition was lessened. Defendant clings to the position that it should be considered as just another competitor in the retail bowling business. The law is to the contrary. Brown Shoe Co. v. United States, 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962); Reynolds Metals Co. v. F.T.C., 114 U.S. App. D.C. 2, 309 F.2d 223, 229-30 (1962); Sanitary Milk Producers v. Bergjans Farm Dairy, Inc., 368 F.2d 679 (8th Cir. 1966).

The court of appeals said of Brunswick's argument about "mere substitution of competitors" (18a):

> Brunswick . . . focuses on the "substantially to lessen competition" language of § 7 and urges that no recovery can be had when activity in the marketplace has the effect of preserving a competitor and reducing consumer prices. But to focus on short run beneficial effects on consumer prices is to disregard the disjunctive "or tend to create a monopoly" clause in § 7, and to confuse injury to the public with injury to competitors. The public is not injured while a potential monopolist is vigorously competing to achieve monopoly power, though that injury may come later. Competitors, on the other hand, are injured in their business or property in a short-run period of predatory competition. Brunswick would permit recovery only when there is an injury to competition (such as market foreclosure) and an injury to the competitor.

The thrust of Brunswick's argument is that the continued presence of the acquired company may be legal even though the acquisition itself violated Section 7 as of the acquisition date. By some new physics of words, legal hydrostatics is overcome, and Brunswick supposes that an acquisition which was illegal at the moment when made becomes lawful the moment after. This Court has rejected a very similar argument by an antitrust defendant that Section 7 "is applicable only to the acquisition of stock and not to the holding or subsequent use of the stock," ruling instead in *United*

States v. *E. I. du Pont de Nemours and Co.*, 353 U.S. 586, 597, 77 S. Ct. 872, 879 (1957):

> . . . [The argument] misconceives the objective toward which § 7 is directed . . . . Its aim was primarily to arrest apprehended consequences of inter corporate relationships before those relationships could work their evil, which may be *at any time after the acquisition,* depending upon the circumstances of the particular case. . . . [Emphasis added].

Other decisions of this Court on divestiture premise that the continued presence of the acquired company of necessity is illegal. "[Divestiture] is an equitable remedy designed in the public interest to undo what could have been prevented had the defendants not out-distanced the government in their unlawful project." *Schine Chain Theatres, Inc.* v. *United States,* 334 U.S. 110, 128, 68 S. Ct. 947, 957 (1948). "[Divestiture] should always be in the forefront of a court's mind when a violation of § 7 has been found." *United States* v. *E. I. du Pont de Nemours and Co.*, 336 U.S. 316, 331, 81 S.Ct. 1243, 1252-53 (1961). "Complete divestiture is particularly appropriate where assets or stock acquisitions violate the antitrust laws. . . . Divestiture is a start toward restoring the pre-acquisition situation." *Ford Motor Company* v. *United States,* 405 U.S. 562, 573, 92 S.Ct. 1142, 1150 (1972). "Divestiture performs several functions, the foremost being the liquidation of the illegally acquired market power." *United States* v. *Greater Buffalo Press, Inc.*, 401 U.S. 549, 556, 91 S.Ct. 1692, 1697 (1971).

Applying these rulings by this Court on the appropriateness of divestiture, the district court held that "[i]n considering the propriety of [equitable] relief *the Court is mindful that the jury has already found injury and has*

awarded damages" (51a) (Emphasis supplied). The district court also expressly found that Brunswick's "opportunity to tap the deep pocket did not prove merely to be a potentiality" (55a), that Brunswick's vertical mergers represented "the actual danger that threatens both the bowling industry and these plaintiffs", and that "[t]his danger can effectively be removed only by rescinding the merger" (60a). It also made this finding (57a):

> . . . [N]ot only does this defendant possess the *potentiality* to substantially lessen competition (because of its dual capacity as a manufacturer, creditor and supplier of bowling equipment as well as a purchaser of the same) but also the jury has already found the *actuality* of this anti-competitive effect when it assessed its award of damages in favor of the plaintiffs. The very fact of the jury's finding, unless it was so erroneous as to demand a judgment n.o.v. which I have previously denied, is sufficient to support my present decision to order injunctive relief. [Emphasis in original].

These findings by the district court also bring in sharp focus the rule that "the evidence on a motion for judgment n.o.v. must be viewed by the appellate court in the light most favorable to the non-movant." *Western Hills Bowling Center, Inc.* v. *Hartford Fire Ins. Co.*, 412 F.2d 563, 565 n.2 (5th Cir. 1969). This rule is particularly pertinent here because the court of appeals literally retried the facts of the case without giving the slightest weight to the findings of the jury and the findings of the trial court.

The concept of an illegal status which by its very existence creates damages is not foreign to antitrust jurisprudence. In *F.T.C.* v. *Tyons Corner Regional Shopping Center,*—F.T.C.—, 3 CCH Trade Reg. Rep. ¶20,933 (1975), at 20,773, the Commission had before it the legality of "approval clauses" in shopping center leases giving to lessees,

among other things, the right to approve or reject prospective tenants in the shopping center. Respondent contended that in never having actually disapproved of a prospective tenant it should not be held in violation for mere acquisition and possession of the right to do so (at 20,773).

The Commission gave no weight to the respondent's protest that it was "being cited for the mere possession of unexercised market power", but distinguished between growing "in response to business imperatives" from "contracting for and retaining rights as broad as those it acquired" (at p. 20,776). Commissioner Dixon stated that the acquisition of approval rights was analogous to "the man who acquires a machine gun, arguing that he intends to use it only in self defense. While heavy armaments can doubtless be used for this purpose, so can many less dangerous weapons, and laws properly forbid the acquisition and possession of machine guns without waiting for a calamity" (at 20,776). The Commission did not urge that the possession of an acquired company is the equivalent of the possession of a machine gun, but emphasized that the nature of the violation made meaningless a distinction between illegality in the incipiency and illegality in the presence.

On the facts of the instant case this is particularly so because both the findings of the jury and of the trial court on the equity aspect of the matter were that the acquisition was contaminated by Brunswick's deep pocket financing. That contamination continued throughout the retention of the bowling centers and is evidenced by the fact that the bowling centers were operated at a loss for five years in Pueblo and Poughkeepsie and as many as three years in Paramus (Appendix A). The Poughkeepsie center was closed down by Brunswick some four years before trial, and

thus, post-operative period served as a laboratory demonstration of the propriety of the damage projections submitted by respondents.* A division among the survivors of the gross receipts of Dutchess Lanes of Poughkeepsie, New York upon abandonment by Brunswick, less adjustment for loss of bowlers, showed that the experts' formulae as applied in Pueblo and Paramus were remarkably accurate (Pl. Ex. 53, A. 1737). Such a showing surely corresponds with the antitrust damage test which is defined as the "but for" test as in *Schulman* v. *Burlington Industries, Inc.*, 255 F. Supp. 847 (S.D.N.Y. 1966), the proximate cause test as in *Billy Baxter, Inc.* v. *Coca-Cola Co.*, 431 F. 2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923, 91 S.Ct. 877 (1971), or the target area test as in *Karseal Corporation* v. *Richfield Oil Corporation*, 221 F. 2d 358 (9th Cir. 1955).

The problem presented by Question No. 1 is met in two ways. We have seen above (pp. 2-4, *supra*) that the major premise of the first question is faulty to the extent that its form does not acknowledge that a violation of Section 7 has taken place. We also answer the question affirmatively in the terms presented, notwithstanding the vast gulf which exists between the language of the question and the reality of the case. The continuing presence of Brunswick in the markets in which the competitive Treadway bowling centers were found was in itself wrongful since Section 7 not only strikes at the mere prohibited acquisition of a company, but also against the retention of the company by the acquiring company.

In *United States* v. *I T T Continental Baking Company*, 95 S.Ct. 926 (1975) (see also *Ford Motor Company* v.

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* The damages were based upon the demonstration of the profit yield per lane per bowling center including residual benefits such as the sale of drinks at cocktail bars, bowling balls, gloves, etc. (Pl. Exs. 11-15; A. 1623-27).

United States, 405 U.S. 562, 572-3, 92 S.Ct. 1142, 1149-50 (1972)), this Court had before it a consent order settling a Section 7 case which prohibited Continental from "acquiring" stock or assets of another baker. This Court recognized that the Commission could impose continuing penalties for violation of its order from the date of the contract of acquisition to the filing of the complaint, over the argument that the acquisition must be considered as a single violation. The Government contented that the word "acquiring" meant both purchase and retention of assets. Although the Court was interpreting language in a consent decree, it said as to the word "acquiring" (95 S.Ct. at 936):

> We must assume that the parties here used the words with the specialized meaning they have in the antitrust field, since they were composing a legal document in settlement of an antitrust complaint.
>
> We need not go beyond the Clayton Act itself to conclude that "acquisition" as used in §7 of the Act means holding as well as obtaining assets.

We have, then, in effect a ruling from this Court that the holding as to the acquisition continues its illegal status. It is not necessary for the retention of the acquired company to be used as a tool towards monopoly in order for the status to be wrongful. Mr. Justice Stewart in the *I T T Continental Baking Company* case, in part quoting from *F.T.C.* v. *Western Meat Co.,* 272 U.S. 554, 47 S.Ct. 175 (1926), stated (95 S.Ct. at 936-37):

> Thus, the framers of the Act did not regard the terms "acquire" and "acquisition" as unambiguously banning only the initial transaction of acquisition; rather, they read the ban against "acquisition" to include a ban against holding certain assets . . . "The order here questioned was entered when respondent actually *held and owned* the stock *contrary to law.* The Commission's duty was to prevent *continuance of this unlawful action* by an order directing that it cease and desist therefrom and divest itself of *what it had no right to hold.*" [Emphasis in original].

Moreover, in *I T T Continental Baking,* the Court relied, as we do, on *du Pont* (95 S.Ct. at 937):

> Similarly, this Court's opinion in United States v. du Pont, 353 U.S. 586, 77 S.Ct. 872, 1 L.Ed.2d 1057 (1957), rests upon the conclusion that "acquisition" can mean, and in the context of §7 of the Clayton Act does mean, both the purchase of rights in another company and the retention of those rights.

The nature of the violation being understood, respondents, to recover, need only show that the unlawful acquisition is causal of damages to it. Acquisition includes retention which equals presence.

When Brunswick chose to acquire a center after foreclosure instead of merely repossessing the chattels, it illegally filled the void which otherwise would have existed. Thus, we do not have a mere substitution of competitors, but a supplementation of competitors. Brunswick made itself a viable competitor under circumstances where, if it had merely chosen to foreclose on the chattels, there would have been no competitor at all since, as noted above, the costs for automatic pinsetters and lanes are the largest costs of a bowling center and it could not have been possible for a bowling center with so large a debt to replace these chattels had they been removed by Brunswick. (See pp. 15-16, *supra.*)

Otherwise stated, the mere presence argument is that Brunswick's presence in the three markets was proscribed by the statute and was unlawful. Brunswick was in effect disqualified and barred from operating bowling centers in

these three markets. That being so, respondents were hurt by the Brunswick presence without regard to the lessening of competition taking place through the various practices of Brunswick before and after the acquisition. When, in antitrust jurisprudence, the fact of injury has been established, a lesser test describes the extent and measure of damages. *Story Parchment Co.* v. *Patterson Parchment Co.*, 282 U.S. 555, 51 S.Ct. 248 (1931); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 89 S.Ct. 1562 (1969); *Rea* v. *Ford Motor Company*, 497 F.2d 577 (3d Cir.), *cert. denied*, 419 U.S. 868, 95 S.Ct. 126 (1974). Any different rule would give to Brunswick the reward of its illegal conduct and would bar respondents from the reasonably to be anticipated profits which would have come to them upon Brunswick's foreclosure of the lanes and pinsetters. We submit that all talk of what might have happened if the business had continued in the original owner's hands, or if someone else had taken it over, is purely speculative since Brunswick, by its own conduct, made such alternatives unavailable. For these reasons, a remand to the trial court for further correlation of damages and continued illegal practices is inappropriate.

It is the holding on or the retention of the premises which constitute the continued illegal activity. In this context, it should be noted that the Brunswick-acquired centers in the pertinent market areas were often run at a loss for years after their initial acquisition. (See Appendix A.) It is not speculative to suppose that the illegal presence in the market of the Brunswick-operated centers has deprived the respondents of income. Brunswick's own records show that only the deep pocket company which it was found to be could have kept the acquired centers going, even were we to suppose that Brunswick did not foreclose on their physical assets (Pl. Ex. 46; A. 322, 1683-99). The answer to Question 1 then is "yes", but the facts of record

show that respondents' injury was due to more than the mere illegal presence of Brunswick.

The court of appeals gave abstract endorsement to the proposition that Brunswick violated Section 7 of the Clayton Act and that such violation was legally compensable under Section 4 of the Act (19a) but, nonetheless, mandated yet a third jury trial for the determination of already established facts of record. In particular, its holdings that Brunswick's continued presence as a competitor in its customers' markets was illegal and that injured horizontal competitors such as respondents can recover damages caused by the acquisition (10a-14a, 16a-19a) did not take into consideration the damage consequence necessarily flowing from that illegal presence in the market.

For all practical purposes the court of appeals ignored the fact that respondents fully met the traditional tests of damage causality since the damages shown resulted from Brunswick's operation of the acquired centers. *Radiant Burners, Inc.* v. *Peoples Gas Light and Coke Company*, 364 U.S. 656, 660, 81 S. Ct. 365, 367 (1961); *Schulman* v. *Burlington Industries, Inc.*, 255 F.Supp. 847, 851 (S.D.N.Y. 1966). In *Radovich* v. *National Football League*, 352 U.S. 445, 454, 77 S.Ct. 390, 395 (1957) this Court said:

> Congress itself has placed the private antitrust litigant in a most favorable position through the enactment of § 5 of the Clayton Act . . . In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws.

A requirement that respondents prove that the acquired company would otherwise have gone out of business flies in face of the record which shows that Brunswick itself put the centers out of business. (See pp. 21-22, *supra*.) It also

negates longstanding antitrust doctrine of this Court. To require speculative proof concerning such unprovable future events will allow wrongdoers to escape money damages solely because their wrongdoings made these damages impossible of ascertainment. *Bigelow* v. *RCA Radio Pictures Inc.*, 327 U.S. 251, 66 S.Ct. 574 (1946); *North Texas Producers Assn.* v. *Young*, 308 F.2d 235 (5th Cir. 1962); *Darden* v. *Besser*, 1957 Trade Cases ¶ 68,646 (E. D. Mich. 1956), *aff'd*, 257 F.2d 285 (6th Cir. 1958); *William H. Rankin Co.* v. *Associated Bill Posters of U.S.*, 42 F.2d 152 (2d Cir. 1930).

The proper test is if the damages to the plaintiff are causally connected with the illegal presence found to violate Section 7, they are proximate to the acquisition, Section 4 is satisfied, and the damages are recoverable. *Gottesman* v. *General Motors Corp.*, 414 F.2d 956, 961 (2d Cir. 1969); *Billy Baxter, Inc.* v. *Coca-Cola Co.*, 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923, 91 S.Ct. 877 (1971); *Schulman* v. *Burlington Industries, Inc.*, 255 F. Supp. 847 (S.D.N.Y. 1966); *Metropolitan Liquor Co.* v. *Heublein, Inc.*, 305 F. Supp. 946, 949 (E.D. Wisc. 1969).

Brunswick's suggestion that there may be no right to recover damages under Section 7 (Brunswick Brief, p. 27, n. 26) directly contradicts this Court's interpretation of Section 4 of the Clayton Act and its clear directive that any person injured in his business or property by reason of any antitrust violations may recover treble damages. As this Court has noted, this impetus to recover treble damages promotes "the public interest in vigorous enforcement of the antitrust laws through the instrumentality of private treble-damage action," *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322, 329, 75 S.Ct. 865, 869 (1955), "the overriding public policy in favor of competition," and "the use-

fulness of the private action as a bulwark of antitrust enforcement." *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 139, 88 S.Ct. 1981, 1984 (1968). As was stated in *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U.S. 743, 751-752, 67 S.Ct. 1015, 1019 (1947):

> . . . It is clear Congress intended to use private self-interest as a means of enforcement and to arm injured persons with private means to retribution when it gave to any injured party a private cause of action in which his damages are to be made good threefold, with costs of suit and reasonable attorney's fee.

Brunswick states at page 29 of its brief that "the principles espoused by the Third Circuit are a direct contradiction of the views expressed by the Second Circuit in *Gottesman*." Not so. Judge Feinberg in *Gottesman* v. *General Motors Corp.*, 414 F.2d 956 (2d Cir. 1969), placed the principal emphasis on "cause in fact", i.e., on whether a plaintiff can show an actual injury causally related to the violation. Indeed, the Second Circuit emphasized in *Gottesman* (414 F.2d at 961):

> Of course, plaintiffs cannot rest on a showing of a violation of Section 7; they must, as in private actions under other sections of the antitrust laws, prove that they have been injured by the violation.

The doctrine of *Gottesman* was applied, not flouted, when the Third Circuit stated (19a):

> We hold, then, that a horizontal competitor of a company acquired by a deep pocket parent in violation of § 7 can recover damages under § 4 if it shows injury in fact causally related to the violator's presence in the market, whether or not that injury flows from or results in an actual lessening of competition.

POINT II

The jury, trial court and third circuit properly rejected Brunswick's "Catch-22" argument that respondents' theory of damages actually proved Brunswick's "failing company" defense.

At Point II (pp. 32-38) Brunswick argues that because respondents' theory of damages premises that the acquired businesses would have failed and disappeared from the market had Brunswick not kept them alive, respondents' case now must be dismissed. This premise is said to demonstrate that the acquired centers were "failing companies" which fell within the failing company defense to acquisitions under the antitrust laws. The district court aptly labeled the argument a "neat 'Catch-22' proposition" and rejected it on grounds dispositive here (41a-42a):

> [Brunswick] argue[s] that, because plaintiffs' damage evidence was predicated on the fact that these centers would have gone out of business but for Brunswick's intervention, an admission has been made that the centers were in fact "failing companies". Much more is necessary however, for defendant's neat "Catch-22" proposition to be viable.
>
> One asserting the failing company defense must establish not only that the particular company is in irreversible failure but also that the acquisition in question was the sole alternative available. United States v. Greater Buffalo Press, Inc., 402 U.S. 549, 555, 91 S.Ct. 1692, 29 L.Ed.2d 170 (1971). Whether the companies acquired by Brunswick were in fact failing is somewhat doubtful from the record. Furthermore, there is almost no proof as to the "sole alternative" requirement. A defense is a matter of proof for the defendant. . . . Additionally, the jury received sufficient instructions on the failing company defense [A. 1469-70; A. 1501-02] and found it inapplicable.

Brunswick did not seriously press "failing company" before the court of appeals, devoting only one and a half of 58 pages of its court of appeals brief to a more limited argument that "a plaintiff cannot base a recovery on inconsistent factual positions" (p. 48). The court of appeals reaffirmed that "the failing company defense was a matter on which the defendant Brunswick had the burden of proof" (26a), and it rejected Brunswick's argument (27a).

Brunswick now asserts that "Interstate Lanes and Fair Lawn Lanes were sold as assets of a bankrupt parent corporation" (AIBC) and that the bankruptcy sale established that they were "failing companies" (Brunswick Brief, p. 37). The only evidence about Interstate and Fair Lawn was that they were profit-making centers (A. 249). The district court answered this contention as follows (41a-42a):

> Brunswick also contends that it was the only bidder prepared to purchase all of the assets of AIBC and that that purchase was, therefore, the sole open alternative in order to save that corporation from failure as a matter of law. There were, however, several other bidders at the sale who were prepared to purchase individual establishments. There is no proof in the record, nor has Brunswick made any argument, as to why individual purchases would not present an additional alternative.

Moreover, even as to Interstate and Fair Lawn the failing company defense was pleaded by implication only in Brunswick's answer (A. 32) and it was not pleaded at all

with respect to the Brunswick centers in Pueblo and Poughkeepsie. Brunswick's first express reliance on the "failing company" defense as to Interstate and Fair Lawn was reflected in its proposed jury instructions submitted during the first trial in 1970. Brunswick's proposed jury instructions on failing company at the second trial merely sought a directed verdict based upon the AIBC bankruptcy sale. Brunswick now argues for the first time that three additional "BCOD" centers—Dutchess, Belmont and Ten-Pin—were "failing companies" (Brunswick Brief, p. 37):

> . . . [T]he fact that the rescued bowling centers in this case were "failing companies" is established on the present record both by proof and by admission. . . . Dutchess Lanes, Belmont Lanes and Ten-Pin-On-The-Mall were centers from which petitioner had repossessed the lanes and pinsetters due to defaults in equipment payments, and the evidence is that petitioner never repossessed equipment unless the debtor was hopelessly insolvent.

Brunswick's arguments are based upon a misreading of a trial record which clearly showed that there were no alternatives left once Brunswick foreclosed its conditional bills of sale on the lanes and pinsetters of the independent proprietors who operated Belmont, Dutchess and Ten-Pin. When Brunswick foreclosed on the debt, it instantly eliminated all possibility that the debtor bowling center might be retained by the debtor or be acquired by anybody other than Brunswick. (See pp. 21-22, *supra*.)

Brunswick ignores the facts of record in its belated arguments that it is relieved of its burden of establishing the "failing company" defense because respondents supplied the necessary proof and because respondents should not be

permitted to maintain mutually contradictory positions in the same lawsuit (Brunswick Brief, pp. 36-37).

In 1965, there were numerous bowling centers in debt to Brunswick although, as we have seen, the downpayments on the pinsetters and lanes enabled Brunswick to recapture its manufacturing costs (pp. 15-16, *supra*). Brunswick made different determinations as to the method of handling different bowling center debtors. In some instances it entered into new credit arrangements with them; in some it merely forebore on collection of the debts; in many instances it foreclosed and repossessed pinsetters and lanes warehousing them for purposes of resale. In some instances, including the acquisitions complained of in this case, Brunswick foreclosed but, rather than repossessing the chattels, arranged for the acquisition of the bowling centers (D. Ex. 1; A.1866; A.878-82). In face of these options exercisable by Brunswick there is no way of knowing whether or not the acquired centers would have gone out of business had Brunswick not chosen to put them out of business. We do know that the approximately $700,000 cost of pinsetters and lanes is the major share of a bowling proprietor's investment. We do know that in Puerto Rico and in Florida Brunswick favored centers by forbearance for years, and that without the imperative to pay on their equipment investments these centers survived during the periods of forbearance (Tr. 557-58). Clairvoyance, however, would be needed to anticipate the future of any of the bowling centers acquired by Brunswick on the assumption that the acquisitions had not taken place.

It is incontestable that Brunswick put its customers out of business except in the instance of the bankruptcy sale in the Paramus area; as to the latter, the record is clear that not only were there possible alternative buyers but also that a chain of centers was sold (A. 476-78). There is evidence

that some of the members of the chain were solvent but that the bankruptcy ensued as to the gross operations of the chain (A. 249). Brunswick made no effort to sort these out or to show that centers acquired in the Paramus, New Jersey area individually were losing centers. Indeed, one of the AIBC centers was purchased by a stranger at the bankruptcy sale and almost immediately repurchased by Brunswick at a profit to the stranger (A. 478-48). The failing business doctrine is unavailable to Brunswick because, as in the tale of the self-made orphan who pleads for compassion on that ground, if the acquired center failed it was because, as we have seen, Brunswick itself occasioned the failure.

In tort law it is commonplace that when the tort feassor makes a substantial contribution to the injury complained of he may not recover. *United States Fidelity & Guaranty Co.* v. *McCullough,* 202 F.2d 269 (5th Cir.), *cert. denied,* 346 U.S. 868, 74 S.Ct. 108 (1953); *Raritan Trucking Corp.* v. *Aero Commander, Inc.,* 458 F.2d 1106 (3d Cir. 1972); *Freeman* v. *United States,* 509 F.2d 626 (6th Cir. 1975). In contract law where the promisor is prevented from living up to his promise by the promisee, the promisor is discharged from his obligation to perform the contract. *Anvil Min. Co.* v. *Humble,* 153 U.S. 540, 14 S.Ct. 876 (1894); *Chicago* v. *Tilley,* 103 U.S. 146 (1880); 12 *Am. Jur., Contracts,* §38 (1964). See also *Mutual Life Insurance Co.* v. *Armstrong,* 117 U.S. 591, 6 S.Ct. 877 (1886); *John Hancock Life Insurance Co.* v. *Willis,* 438 F.2d 1207 (6th Cir. 1971); *In re Sparks' Estate,* 172 Misc. 642, 15 N.Y.S. 2d 926 (Sur. Ct. 1939).

An antitrust violator may not escape money damages because its antitrust violations make it difficult for its victims to prove damages. *Bigelow* v. *RCA Radio Pictures, Inc.,*

327 U.S. 251, 264-265, 66 S.Ct. 574, 579-580 (1946); *Story Parchment Co.* v. *Patterson Parchment Co.,* 228 U.S. 555, 561-564, 51 S.Ct. 248, 250-251 (1931); *Eastman Kodak Co. of New York* v. *Southern Photo Materials Co.,* 273 U.S. 359, 379, 47 S.Ct. 400, 405 (1927).

Further, the cases cited by Brunswick have nothing to do with the "failing company" defense (Brunswick Brief, p. 36, n. 33) since they go only to the right of a party to rely upon facts actually proved by its opponent. All of this is away from the point since the controlling law is that the burden of proving the "failing company" defense is upon the party seeking to avail itself of it. *Citizen Publishing Co.* v. *United States,* 394 U.S. 131, 89 S.Ct. 927 (1969); *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 82 S.Ct. 1502 (1962); *International Shoe Co.* v. *Federal Trade Commission,* 280 U.S. 291, 50 S.Ct. 89 (1930). In order to meet that burden Brunswick must show these three elements formulated in *Citizen Publishing:*

(a) that the acquired company was "so depleted and the prospect of rehabilitation so remote that 'it faced the grave probability of business failure'" (394 U.S. at 137, 89 S.Ct. at 930); see also *Erie Sand and Gravel Co.* v. *Federal Trade Commission,* 291 F.2d 219 (3d Cir. 1961);

(b) that Brunswick was the "only available purchaser" (394 U.S. at 138, 89 S.Ct. at 931); see also *United States* v. *Diebold Inc.,* 369 U.S. 654, 82 S.Ct. 993 (1962); *Golden Grain Macaroni Co.* v. *Federal Trade Commission,* 472 F.2d 882 (9th Cir. 1972), *cert. denied,* 412 U.S. 918, 93 S.Ct. 2730 (1973); and

(c) that the prospects of reorganization were "dim or nonexistent" (394 U.S. at 138, 89 S.Ct. at 931); see also *United States Steel Corp.* v. *Federal Trade Commission,* 426 F.2d 592 (6th Cir. 1970).

Brunswick failed to establish any of these three elements. Brunswick's "failing company" defense at the trial level was confined to the two bowling centers of the AIBC Chain in the Paramus market. Brunswick's proof at trial showed that it was not the only available purchaser at the bankruptcy sale of the AIBC chain, but aggressively outbid other possible purchasers (A. 476-78). At the trial Brunswick defaulted on the issue of whether the prospects for reorganization were "dim or nonexistent", and, of course, neither respondents nor Brunswick had the opportunity of proving whether there were alternative purchasers for the other centers or whether the centers were on the verge of going out of business because Brunswick took those matters into its own hands and put them out of business.

The economic rationale of the "failing company" defense does not apply. The "failing company" doctrine arose in *International Shoe Co.* v. *Federal Trade Commission,* 280 U.S. 291, 50 S. Ct. 89 (1930). The purposes of making this exception were to protect against loss to stockholders and injury to the communities where plants were operated, interests hardly pertinent here since the acquisitions were by foreclosure or bankruptcy sale and since bowling centers have only a few employees (280 U.S. at 302, 50 S.Ct. at 93).

More importantly, on the level of assumption, contrary to fact, that the defense was properly made and available to Brunswick, there would be good economic reason not to apply the "failing company" doctrine here, even had the bowling centers gone out of business. It is not suggested that the failure of these businesses stemmed from bad management (in which case a substitution of good management by acquisition might have been justified),* but there is

* E.g., Low *The Failing Company Doctrine: An Illusive Economic Defense Under Section 7 of the Clayton Act,* 35 FORD. L. REV. 425, 442 (1967); but see Dooley, *Failing Company Doctrine: Recent Developments,* 47 TEX. L. REV. 1437 (1969).

indication to the contrary that failures resulted from a contraction of the bowling market. Brunswick argues that in the early 1960's there was a decline in demand for bowling and the record shows over-building of centers in relation to demand (see pp. 15-18, *supra*). In this situation some bowling operators should have gone under. It has been noted that (Dooley, *Failing Company Doctrine: Recent Developments,* 47 TEX. L. REV. 1437, 1440 (1969)):

> When failure is caused by overcapacity, the greater economic good . . . usually dictates dispersion rather than maintenance of facilities because preservation will only saturate an already satiated market [footnote omitted].

Brunswick, however, had other designs. As a giant deep pocket company it could afford to enter the market, prop up uneconomic operations and take business away from the remaining independent businessmen by operating at a loss. These subsidized loss operations lessened competition and tended toward monopoly. See: *United States* v. *New York Great A. & P. Tea Co.,* 173 F.2d 79, 87 (7th Cir. 1949). There is no difference between Brunswick's entry into the local markets to take business away from the others, thus transferring Brunswick's losses to them, and the fighting ship cases. *Thomsen* v. *Cayser,* 243 U.S. 66, 37 S. Ct. 353 (1917); *United States* v. *Hamburg Amerikanische P.F.A. Gesellschaft,* 200 Fed. 806 (S.D.N.Y. 1911), 216 Fed. 971 (1914), *rev'd on grounds of mootness,* 239 U.S. 466, 36 S. Ct. 212 (1916); Fugate, *Foreign Commerce and the Antitrust Laws* 403 (2d Ed. 1973).

The "failing company" doctrine was not developed to rescue giant integrated predators like Brunswick from vertical acquisitions, and the drafters of the 1950 amendment certainly never contemplated permitting corporate

carnivores to consume their customers. Its origins are quite different. The "failing company" doctrine seems to have appeared first on the antitrust scene in *American Press Ass'n* v. *United States,* 245 Fed. 91 (7th Cir. 1917), to have appeared again in *Aluminum Co. of America* v. *Federal Trade Commission,* 284 Fed. 401 (3rd Cir. 1922), *cert. denied,* 261 U.S. 616, 43 S. Ct. 362 (1923), to have been formulated explicitly in *International Shoe* v. *Federal Trade Commission,* 280 U.S. 291, 50 S. Ct. 89 (1930) and to have been refined to its present form in *Citizen Publishing Co.* v. *United States,* 394 U.S. 131, 89 S. Ct. 927 (1969); see *Comment,* 61 MICH. L. REV. 566 (1963); Connor, *Section 7 of the Clayton Act; the "Failing Company" Myth,* 49 GEO. L. J. 84 (1960).

Each of these cases involved a horizontal acquisition where the question at issue was whether one member in a competitive market could acquire another in the same market. Each case presented two alternatives: either absorption of the business of a company through business failure or absorption of its business through merger. Under either alternative the business was transferred to one or more companies already in the market; under either alternative there was a reduction in the market of one of the competitors. Thus merger and failure had the same economic effect in the case of a horizontal merger.

Merger and failure do not have the same economic effects in the case of a vertical acquisition, which is the case at bar. Brunswick was a supplier many times larger than any of the bowling centers in any of the regional bowling markets. Its acquisition of its customers, far from adjusting to the decline in demand by reducing the number of entities in the market in the same way as would business failure, represented the entry into a declining market of a new giant integrated concern ready, willing and able to absorb losses for years and to cause losses for everyone else.

(See pp. 10-14, *supra.*) Its officers made a conscious decision to enter the bowling center market as operators. It did not care that the effect was to transfer part of its own losses to the small, independent businessmen already in the bowling center market, whose resources were far less than Brunswick's.*

This is a totally different phenomenon from that envisaged by the formulators of the "failing company" doctrine. Where giant vertically integrated concerns seek to take advantage of the failing company doctrine to hide the cannibalization of their customers, the courts have stood as a bulwark to protect small businessmen. In *United States Steel Corporation* v. *Federal Trade Commission,* 426 F.2d 592 (6th Cir. 1970), the sixth circuit affirmed the Federal Trade Commission's rejection of the acquisition by U.S. Steel of a failing customer of cement. U.S. Steel sought to acquire Certified Industries, a company with between 6% and 12% of the ready mixed concrete market in the New York metropolitan area. While the court fell back on U.S. Steel's failure to satisfy the technicalities of the failing company doctrine, it stated (426 F.2d at 606):

> . . . [W]e find substantial evidence to support the Commission's finding that the anticompetitive consequences in Certified's continued existence as a giant vertically integrated concern would deteriorate competitive conditions in the concrete and cement industry more than its elimination by business failure.
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> • • • • •
>
> . . . [T]he reduction of the number of ready-mix competition by one may be far less anticompetitive than Cer-

* Compare criticism of failing company acquisition which increases share of industry leader. Low, *The Failing Company Doctrine: An Illusive Economic Defense Under Section 7 of the Clayton Act,* 35 FORD. L. REV. 425, 428 (1967).

> tified's continued existence as a vertically integrated giant . . . The presence of a vertically integrated company in a concentrating industry serves to dampen the vigor of competition by non-integrated concerns. Also potential entrants, as well as non-integrated ready-mix producers, will be less likely to challenge the pricing practices of a concern with resources so many times larger than their resources as is the U.A.C.-Certified-U.S. Steel complex.

In *United States Steel Corp.* v. *Federal Trade Commission,* 426 F.2d 592, 606-67 (6th Cir. 1970) the court spoke with approval of the F.T.C.'s view that the circumstances of a failing company were merely one factor to be taken into account in determining the legality of a merger, rather than an absolute defense. The Commission had taken the position (426 F.2d at 606):

> that the "failing company doctrine" does not grant absolute immunity under section 7 where, in view of an acquisition's anticompetitive effects, the probable "harm to individuals" and "injury to the communities where its plants were operated" is not so serious that the consummation of the acquisition is in the "public interest."

Commentators have pointed out that blind application of the failing company doctrine may be more harmful than the situations it was intended to cure. Low, *The Failing Company Doctrine: An Illusive Economic Defense Under Section 7 of the Clayton Act,* 35 FORD. L. REV. 425, 428 (1967); *Comment,* 61 MICH. L. REV. 566, 577-578 (1963).

The danger of permitting Brunswick to integrate forward in this manner is even greater in this case than ordinarily. Brunswick is the supplier of lanes and pinsetters to over 50% of the bowling centers throughout America.

This position gives it enormous financial leverage over those competitors who must make payments to it monthly under their security agreements with Brunswick. Brunswick did not hesitate to foreclose on the centers it acquired in the three markets involved here. Brunswick placed respondents' centers on a cash basis. Brunswick put the acquired centers out of business entirely. To permit such a giant predator, by means of acquisition, to roam the fields in which are found the tiny competitors in the bowling center business would represent a surrender of all hope of genuine competition. *United States* v. *Grinnell Corp.,* 236 F. Supp. 244 (D.R.I. 1964), *aff'd,* 384 U.S. 563, 86 S. Ct. 1698 (1966); *Reynolds Metals Company* v. *Federal Trade Commission,* 309 F.2d 223 (D.C. Cir. 1962).

CONCLUSION

Respondents respectfully submit that the Court should resolve the two certified questions by accepting respondents' position. Respondents urge the Court also to push aside any technical concepts of review in order that a speedy disposition of this ten-year old litigation may now be reached. Respondents' petition for certiorari (No. 75-770) has not been ruled on by this Court. Presumably it has been held in abeyance pending the Court's disposition of the two questions as to which certiorari has been granted.

Respondents urge that the Court attempt to bring about a speedy and just result by ruling upon respondents' petition for certiorari without delay. Should this be done, we suggest with great respect that the first question presented in respondents' petition no longer requires resolution

since it is subsumed by the first question certified and already presented to the Court for ruling. As to the others which are reprinted hereafter, we hope that this Court will devise an order accelerating their resolution.

Surely the appellate process of this Court must be malleable enough so that justice may be accomplished without so much delay that the dearest interests and aspirations of people are not ultimately consumed by rust. This litigation began in 1966 and twice had to work its weary way through the trial calendars of the District Court for the District of New Jersey. After the verdict of May 11, 1973, it took until August 29, 1975 for an opinion to come from the Court of Appeals for the Third Circuit. Should remand be affirmed by this Court some time in the winter of 1976-77, it is not anticipated that the case can be reached for trial in the normal course until 1978. Should appeals bring this case back to this Court, it is quite reasonable to suppose that the matter would not be decided until 1980.

We urge the Court to consider the Third Circuit's decision in light of this Court's directive in *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 696, 82 S. Ct. 1404, 1409 (1962):

> The Court of Appeals was, of course, bound to view the evidence in the light most favorable to [the prevailing party] and to give it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn. . . .

In respect of questions relating to the propriety of the damage findings, we remind the Court that the court below assumed that Brunswick right raise issues as to damage findings even though it had defaulted in presenting rebuttal evidence, and failed to disturb the credibility of the damage witnesses in any way (45a-46a).

We also address the Court's attention to the observations of the venerable Judge Edward Weinfeld in *United States* v. *Standard Ultramarine & Color Co.*, 137 F. Supp. 167 (S.D.N.Y. 1955), "this auxiliary policing method did not altogether fulfill its purpose" [referring to private antitrust actions] because small plaintiffs "able and willing to assume the staggering cost of litigation were frequently worn out by their opponents by sheer attrition" (137 F. Supp. at 171). We respectfully submit that this Court should dispose of respondents' questions two to nine, inclusive, by setting them down for speedy hearing. They are:

> (2) Assuming that petitioners may be entitled to money damages for such violation [of Section 7], did the district court improperly instruct the jury concerning the measure of damages in such a way as to require a new trial?
>
> (3) Is not a private antitrust plaintiff entitled to the injunctive relief of divestiture under Section 16 of the Clayton Act against the illegal market presence of a respondent who has violated Section 7 of that Act by acquiring one of petitioner's horizontal competitors, notwithstanding that the threatened petitioner has survived after respondent's acquisition of that competitor?
>
> (4) Must an order for equitable relief (including divestiture) issued by a district court pursuant to Section 16 of the Clayton Act, on the basis of evidence previously presented to a jury in the same court, be set aside solely on the grounds that the trial judge erroneously instructed the jury on the issues of liability and damages under Sections 7 and 4 of that Act, notwithstanding the recognition by the court of appeals that it was "obliged . . . to review the district court's findings of fact by a different standard"?

(5) Must petitioners re-litigate the question of whether, under Section 7 of the Clayton Act, an acquired company was "engaged in the flow of interstate commerce" pursuant to decision of this Court in *United States* v. *American Building Maintenance Industries,* 95 S. Ct. 2150 (1975), solely on the grounds that this decision was rendered after trial and without regard to the evidence of such engagement as actually presented to the jury?

(6) When the trial record demonstrates that an acquired company would have gone out of business but for its acquisition by respondent, are petitioners' damages resulting from lost profits under the "but for" test measured from the time of the acquisition or from an indeterminate later time based upon the assumption that the acquisition never occurred?

(7) Does a jury's rejection of the "failing company" defense and the requirement that the acquiring company prove that it was the only available buyer for the acquired company represent, as a matter of law, a corollary finding that the acquired company was not effectively and inevitably out of business at the time of its acquisition?

(8) When respondent refuses to rebut petitioners' proof of a range of damages, on the stated grounds that respondent denies liability and that damages are thus academic, does the trial judge err in instructing the jury that if it first finds respondent liable, it must find damages for petitioners within that range as proven by their five expert witnesses, when the trial judge has also properly instructed the jury on its prerogatives and duties as to the credibiiity of, and mutual corroboration among, such witnesses?

(9) In the face of uncontroverted evidence as to damages accepted by the jury, is it required that the jury be free to speculate on the precise quantum of damages after it has determined that respondent violated Section 7 of the Clayton Act and that petitioners were causally injured thereby?

Alternatively, we respectfully ask the Court to reverse so much of the decision of the Third Circuit as requires remand for further trial and to reinstate the verdict of the jury and the findings and the judgments of the trial court.

Dated: New York, New York
July 30, 1976

Respectfully submitted,

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APPENDIX

APPENDIX A

This tabulation extracts P & L figures found on Plaintiffs' Exhibit 47 (1) as computed by BCOD ("BCOD Profit"), and (2) as computed for an independent proprietor who is a Brunswick customer ("Indep't Profit").

BCOD Center	1965 BCOD Profit	1965 Indep't Profit	1966 BCOD Profit	1966 Indep't Profit	1967 BCOD Profit	1967 Indep't Profit	1968 BCOD Profit	1968 Indep't Profit
Belmont	($25,789)	—	($ 4,241)	($25,320)	$ 1,264	($ 17,026)	($ 20,075)	($ 33,346)
Dutchess	(5,192)	—	(30,755)	(54,784)	(28,776)	(52,168)	(23,279)	(46,630)
Interstate	(31,742)	—	11,392	(12,531)	34,581	10,539	61,475	25,748
Fair Lawn	12,022	—	34,870	15,976	46,713	26,876	39,083	19,432

BCOD Center	1969 BCOD Profit	1969 Indep't Profit	1970 BCOD Profit	1970 Indep't Profit	1971 BCOD Profit	1971 Indep't Profit	1972 BCOD Profit	1972 Indep't Profit
Belmont	($21,820)	($33,710)	($20,213)	($31,908)	$ 6,328	($ 3,202)	$ 18,253	($ 7,585)
Interstate	73,144	28,760	90,682	45,698	142,567	104,757	123,268	90,076
Fair Lawn	53,288	34,324	77,723	58,049	85,350	67,194	73,337	56,335
Ten-Pin	(2,564)	—	(8,131)	(42,540)	6,945	(27,106)	(2,036)	(40,012)
Lodi	—	—	(27,013)	—	5,030	(47,670)	(46,499)	(98,477)